

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

THIS DOCUMENT RELATES TO:

Hon. Anita B. Brody

Adrian L. Robinson, Sr. and Terri J. Robinson
as Personal Representatives and Co-
Administrators of the Estate of Adrian Lynn
Robinson, Jr., DECEASED, et al.,

No. 2:17-cv-2736-AB

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.

Defendants.

A.H. by her guardian, SHAYANNA JENKINS
HERNANDEZ,

No. 2:18-cv-00464-AB

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE, et al.

Defendants.

NOTICE

On February 16, 2018, the Court received a letter (attached) from counsel for Plaintiffs in the actions *Robinson v. National Football League*, No. 17-2736 and *Hernandez v. National Football League*, No. 18-464. On February 26, 2018, the NFL Parties responded, also via letter to the Court (attached). Because these letters were not filed on ECF, the Court will not consider their contents.

3/6/18
DATE

Anita Brody
ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

Copies **MAILED** on _____ to:

THE BRAD SOHN LAW FIRM, PLLC

Bradford Rothwell Sohn, Esq.
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February 16, 2017

via e-mail only

RE: *Robinson v. Nat'l Football League, et al*, No. 2:17-cv-2736-AB ("Robinson");
Hernandez v. Nat'l Football League, et al, No. 2:18-cv-464-AB ("Hernandez"); and
Burnett v. Riddell, Inc., et al, No. 2:18-cv-551-AB ("Burnett")

Hon. Judge Anita B. Brody
United States District Court
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street, Room 7613
Philadelphia, PA 19106

Dear Judge Brody,

As you may know, I am counsel for the *Robinson* and *Hernandez* Plaintiffs. In addition, counsel for the *Burnett* Plaintiffs asked me to include their common concerns within this letter. On behalf of *all* of these clients and counsel (including my own co-counsel), I write in hopes of scheduling either a *de facto* Rule 16 conference for post-settlement (e.g., non-opt-out) litigants, or, simply in hopes of gaining any further insights from the Court in whatever form it prefers, and with particular attention to those briefing and SFC-filing scheduling orders created last year, and at a time when the only opt-out litigants were "in play."

Those prior CMOs, governing procedure and scheduling, simply did not account for the possibility of new, *non-opt-out* actions; and, of course, subsequently that possibility materialized. In the meantime, various deadlines lapsed prior to these actions being consolidated into the MDL.¹ The time for SFC (opt-out and Riddell-related) filings, for example, ran literally before the *Burnett* and *Hernandez* complaints had even been filed in their respective state and federal transferor courts.

¹ This issue is particularly confusing with respect to the *Robinson* litigation. Uniquely, *Robinson* became part of the MDL over last summer, in July, but questions remained until October regarding its "related" status. Pending in *Robinson* is Plaintiffs' Motion to Remand, now fully briefed, but not referenced in the Court's Order dated July 18, 2017. D.E. 8030, at ¶ 6-14. That remand analysis—as no one disputes—relates to the removed, state-court pleading; it does not relate to the SAMAC, which only control with respect to *Robinson* if the Court determines that federal jurisdiction exits. Unable to receive clarification and agreement (from Defendants) on these issues, the *Robinsons* filed provisional SFCs as attachments to their remand briefing, intended to be operative, if and when the Court determined it had jurisdiction. In the meantime, however, the Defendants have confusingly included the *Robinson*-related argument within their opt-out/SAMAC Rule 12 briefing. This particularly confuses matters, as the *Robinsons* lacked notice and opportunity to respond to this briefing, which premised on a non-yet operative pleading. Thus, it would seem to be unripe, and improperly before the Court, until and unless it denies remand.

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Nevertheless, various Defendants have referenced non-opt-out Plaintiffs within their *opt-out-related* Rule 12 reply briefing presently before the Court. *See* D.E. 9965, at 10, n.1 (seeking the dismissal of *Hernandez* prior to the filing of an SFC or remand motion); *see also id.*, at 41, n. 18 (seeking dismissal of the *Robinson* action.)

Their having done so poses a challenge: how can we be heard on behalf of our clients, in light of the procedures in place not created for potential future litigants? Can the Defendants properly seek dismissal—particularly due to the lapsed SFC filing deadline—in light of this situation? How does the Court prefer that we advocate for our clients, particularly where the Plaintiffs'-side SAMAC briefing has been presented by Ms. Fleishman, whose role does not extend into these non-opt-out cases?

We recognize that the Court's time is a precious resource and do not seek to waste it, nor to disrupt the procedures set forth for opt-out litigants. Nevertheless, we simply do not know how best to approach this. If the Court wishes that we address these issues with the Defendants, we are happy to revisit doing so, though—speaking on behalf of myself and my clients referenced in this letter—I have attempted this already, and without much traction. I am therefore respectfully asking the Court either to address this matter as it sees fit, or alternatively, to request that the collective do so; part of our problem, and the genesis of this letter, at least as relates to my own clients, has been an inability to understand the Defendants' respective positions on this unusual circumstance-beyond simply reading vague reference to these cases in the separate, Rule 12 briefing. Thus, Court's words—in whatever form—would seem to be quite beneficial in this regard.

Regards and thank you for your consideration,



Bradford R. Sohn

BRS/brs
cc: Counsel of Record

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By Email

Honorable Anita B. Brody
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Robinson v. Nat'l Football League, et al., No. 17-cv-2736-AB ("Robinson")
Hernandez v. Nat'l Football League, et al., No. 18-cv-464-AB ("Hernandez")

Dear Judge Brody:

On behalf of the NFL Defendants, we write in response to the February 16, 2018 letter from Brad Sohn regarding the above-referenced litigations, which are part of *In re: Nat'l Football League Players' Concussion Injury Litig.*, No. 12-md-2323-AB (E.D. Pa.) ("MDL 2323"). For the reasons below, the NFL Defendants respectfully submit that there is no need, as Mr. Sohn requests, for separate treatment of, or briefing for, the *Robinson* and *Hernandez* cases.

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Honorable Anita B. Brody

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The *Robinson* and *Hernandez* cases assert the same substantive claims as the other concussion cases consolidated in this MDL proceeding and should be dismissed for the same reasons discussed in the NFL Defendants' pending motions to dismiss the July 11, 2017 Second Amended Master Administrative Long-Form Complaint ("SAC"). Moreover, as is the case with other plaintiffs whose putative claims are pending before the Court (Tracy Scroggins and Rose Stabler), there are also additional reasons to dismiss *Hernandez* at the outset because, as discussed below, Plaintiff is a Settlement Class Member whose claims were released as part of the Class Action Settlement.

Regarding *Robinson*, plaintiffs' motion to remand raises the same preemption issues as the other MDL cases in which remand has been sought, and remand should be denied in *Robinson* for the same reasons it should be denied in these other cases. (See *Kansas City Chiefs Football Club & Arizona Cardinals Football Club's Joint Opp. to Pls.' Mot. to Remand*, ECF No. 8405.) Moreover, pursuant to this Court's April 12, 2017 Order (ECF No. 7477), and as explained in the NFL Defendants' recent motion to dismiss briefing (ECF No. 8403-1 at 6 n.4; ECF No. 8404-1 at 6 n.4), assuming *Robinson* is not remanded, the *Robinson* plaintiffs' claims have been superseded by the SAC, notwithstanding the fact that *Robinson* was filed subsequent to the April 12 Order. (See Order 1 n.1 & ¶ 6, April 12, 2017, ECF No. 7477 (providing that complaints by all "non-Settlement Class Member plaintiffs with pending claims" in MDL 2323 are superseded by SAC, including complaints "coordinated and/or consolidated in this MDL after [April 12, 2017]"; see also Order 1 n.1 & ¶ 2, July 18, 2017, ECF No. 8030 (same).) Accordingly, the *Robinson* plaintiffs' claims should be dismissed for the same reasons that the SAC should be dismissed. (See generally ECF No. 8403-1, 8404-1, 9665, 9664.)¹

Regarding *Hernandez*, plaintiff is a Settlement Class Member who has released the very claims she now improperly purports to assert. (See ECF No. 9664 at 35-37; see also Mem. in Supp. NFL Defs.' Mot. Stay § I, *Hernandez v. Nat'l Football League, et al.*, No. 17-cv-12244, ECF No. 10 (D. Mass. Nov. 15, 2017); NFL Defs.' Reply Mem. in Supp. Mot. Stay, *Hernandez*, No. 17-cv-12244 (D. Mass. Dec. 11, 2017), ECF No. 37.) The NFL Defendants respectfully submit that the Court should decide this threshold question, which falls under this Court's exclusive jurisdiction to interpret and enforce the Settlement Agreement (see Am. Final Order & J. ¶ 17, ECF No. 6534), before addressing any other issues in *Hernandez*, including remand.² As noted in the NFL

¹ As explained in the NFL Defendants' recently filed reply briefs in support of their motions to dismiss, to the extent that the *Robinson* plaintiffs assert claims against National Football League Foundation, not named in the SAC, those claims are preempted and insufficiently pleaded and thus should be dismissed. (See ECF No. 9665 at 32 n.19; ECF No. 9664 at 22-23.)

² Indeed, this Court's exclusive jurisdiction to resolve this issue was one of the grounds cited by the Judicial Panel on Multidistrict Litigation in support of its decision to transfer *Hernandez* to MDL 2323. (See Transfer Order, *In re Nat'l Football League*

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Honorable Anita B. Brody

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Defendants' reply brief on their pending motion to dismiss for failure to state a claim (*see* ECF No. 9664 at 37 n.33), the NFL Defendants are prepared to file a separate motion to dismiss *Hernandez* on this basis if the Court prefers. In addition to the dispositive issue of plaintiff's status as a Settlement Class Member, the claims in *Hernandez* also are subject to dismissal for the same reasons set forth in the NFL Defendants' motions to dismiss the SAC. (*See* ECF No. 9665 at 1 n.1; ECF No. 9664 at 1 n.1.) The NFL Defendants would also be happy to brief those issues further if the Court prefers.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Bruce Birenboim/cg.", written in black ink.

Bruce Birenboim

cc: Bradford R. Sohn, Esq.
Wendy R. Fleishman, Esq.

Concussion Injury Litig., MDL 2323 (J.P.M.L. Feb. 1, 2018), ECF No. 704.) Although *Hernandez* filed a remand motion prior to transfer, the NFL Defendants respectfully submit that the Court should decide the Settlement Class Member issue prior to adjudicating remand.